Chapter Three

CONTINUITY AND CHANGE IN ISLAMIC LAW: THE CONCEPT OF MADHHAB AND THE DIMENSIONS OF LEGAL DISAGREEMENT IN HANAFI SCHOLARSHIP OF THE TENTH CENTURY[1]

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Introduction

One of the main turning points for the history of Islamic legal reasoning in particular, and the history of Islamic law in general, is the rise of madhhabs. Although the madhhabs had begun to appear in the eighth century, it was only in the tenth century that the process of their formation had reached a point that can be seen as the beginning of a new era in the history of Islamic law. Many historians confirm that the developments that occurred in the tenth century determined the crucial characteristics of classical Islamic law that have lasted until the modern age.[2]

The Hanafi school of law, for example, arose as a distinct juristic movement in the first half of the eighth century and became, in a short period of time, the largest school in terms of the number of its members, its spread throughout the Islamic world, and its domination of the legal machinery of the ʿAbbasid caliphate. After the death of its so-called masters, Abū Ḥanīfa (d. 150/767), Abū Yūsuf (d. 182/798), al-Shaybānī (d. 189/805), Zufar b. al-Hudhayl (d. 158/775), and Ḥasan b. Ziyād al-Luʾluʾī (d. 204/819), the jurists associated with that circle continued to study and teach their masters' legacy. They transmitted their works to the following generations, collected some of their unpublished materials, spread their opinions to new regions, especially towards the eastern territories of the caliphate, applied the founders' opinions to some new problems (such as novel problems of endowment, *waqf*), and some of them tried to defend the founders' legacy by means of prophetic traditions and concepts of legal theory (*uṣūl al-fiqh*), which was at its very nascent stage.[3]

By the beginning of the tenth century, nearly 150 years after the death of Abū Ḥanīfa, this type of juristic activity changed and the post-eponym era entered a different stage.[4] At this time the first legal manuals (*mukhtaṣar*)

and commentaries were written;[5] the first *qawāʾid* (the general principles and policies implicit in the Hanafi legacy) were deduced;[6] prophetic traditions, to which Hanafi juristic tradition referred as legal sources (*masānid*), were compiled;[7] the first theoretical legal works to cover the problems of Islamic jurisprudence, viz. the literature of *uṣūl al-fiqh*, were written; jurists began to write on the problem of how to apply the Hanafi juristic tradition, and how to evaluate and use it in legal reasoning;[8] for the first time some jurists were labeled as leaders of Hanafi scholars of their time;[9] and circles (*ḥalqa*) of Hanafi education that were to have such influence on later generations appeared.[10] All these facts indicate that the Hanafi school in the tenth century, when compared to its body in the previous era, had gained a more distinct identity, a standardized positive law, a more organized form of legal education, and a hierarchical Hanafi legacy, whose elements were classified according to the authoritativeness of their historical texts. In brief, in the tenth century the Hanafi madhhab became institutionalized in the broad meaning of the term. The later literature of Hanafi law confirms the significance of this period in many ways. In the celebrated later Hanafi compendia *al-Hidāya* and the *Fatāwā* of Qāḍīkhān, for instance, the names most frequently cited, except for those of the masters, belong to this period.[11]

The mashāyikh of the Hanafi school

In this century another significant development also occurred: the rise of the so-called *mashāyikh* (pl. of *shaykh*) groups, who were centered around certain Hanafi jurists in various centers of the Islamic world. Literally, *mashāyikh* means the scholars, the professional staff of an Islamic discipline in general or an institute of education in particular.[12] Although the word was used for the leading figures of other Islamic sciences as well as for jurists of other schools of law, Hanafi authors used it as a term for the leading Hanafi jurists who came after the masters.[13] The word began to be used in Hanafi circles in the tenth century,[14] especially in order to represent the following three groups within the Hanafi school: the *mashāyikh* of Iraq, of Balkh, and of Bukhara.

The main center for the jurists of Iraq was Baghdad, the capital of the caliphate. Balkh was the capital city of Khurasan, in the northeast of Persia in what is today Afghanistan, and Bukhara was one of the biggest cities in Transoxania. The map of scholarly relations of the Hanafi jurists in this period confirms that these three groups represented three distinct academic networks. Only a minority of tenth-century Hanafi jurists did not have

direct relations with one of these three groups. Although each network related to the others in some ways, one can easily distinguish them on the basis of the concentration of academic relations with certain figures. In each network there was at least one central figure in each generation of the tenth century, and each figure was distinguished by his numerous and famous students and by his being the principal jurist to issue fatwas in his region.

The earliest central figure of the jurists in Iraq was al-Karkhī. Almost all of the Iraqi jurists of the next generation were his students.[15] As well as his leading position with regard to the issuing of fatwas, he also spearheaded legal education in Iraq.[16] Al-Karkhī was a popular teacher of Hanafi law and his understanding of Hanafi law was also distinct.[17] The sources emphasize that his numerous students spread their master's opinions across different regions of the Islamic world with a missionary zeal.[18]

At the same time as the jurists of Iraq operated, another group of jurists appeared in Balkh. The formation of the latter dates to the period when the students of Abū Ḥanīfa and their disciples were active, i.e., the second half of the eighth century, at which time the network of legal education in Khurasan was concentrated in Balkh, forming a semi-independent network.[19] Abū Muṭīʿ al-Balkhī, a student of Abū Ḥanīfa, started teaching Hanafi law in Balkh together with some of his peers from the early Hanafi circle as early as the eighth century.[20] There are historical records that Abū Muṭīʿ was the first Hanafi master in Khurasan.[21] Although there is little biographical information about the Hanafi jurists who lived between the eighth and the eleventh centuries in Balkh, Hanafi literature is full of their opinions, especially those of Abū Bakr al-Iskāf and Abū l-Qāsim al-Ṣaffār in the early tenth century. It is surprising that they are not mentioned in any literature of Hanafi positive law. Al-Iskāf and al-Ṣaffār are probably the first representative figures of the jurists of Balkh. A generation after these two jurists, another figure, Abū Jaʿfar al-Hinduwānī (d. 362/973), or Abū Ḥanīfa al-Ṣaghīr as he is known in the Hanafi tradition, seems to have been the first chief (*raʾīs*) in the Balkh region in the sense of being the most important name in Hanafi scholarship and constituting the center of the Hanafi network and legal education.[22] Al-Hinduwānī was famous for his skill in solving intricate legal problems[23] and for his journeys to meet with the leaders of the other two *mashāyikh* groups of his time.[24] Finally, the most famous writer among the tenth-century Hanafi scholars, Abū l-Layth al-Samarqandī (d. 373/983 or 393/1003),[25] was al-Hinduwānī's successor in the chieftaincy of the Balkh group. His *Kitāb al-Nawāzil* is the first text to cover the legal opinions of only one particular group of jurists in Hanafi law, the *mashāyikh* of Balkh.[26]

The third *mashāyikh* group is that of the jurists of Bukhara. If we examine the later Hanafi juristic culture, especially that after the Mongol invasion of the thirteenth century, the celebrated al-Māturīdī seems to be the most prominent figure of the tenth century in Transoxania. However, when we examine the scholarly network in Transoxania and the legal opinions of the jurists of that region in the literature, the jurist Abū l-Faḍl al-Bukhārī appears as the central figure. Abū l-Faḍl al-Bukhārī[27] was the student of al-Subadhmūnī,[28] and is the tenth-century scholar most often cited by the later Hanafi positive law texts, especially in the genre of fatwa compilations. Like the central figures of Iraq and Balkh, he was famous for the influence of his legal opinions[29] and for the number of his students.[30] In *Fatāwā Qāḍīkhān*, the famous source for Transoxanian positive law, for example, al-Māturīdī is cited three times, whereas Abū l-Faḍl is quoted literally hundreds of times.[31]

It seems that the predecessor of the group was Abū Ḥafṣ al-Kabīr, who was a student of al-Shaybānī and held a high position in the government in Bukhara. Although his vast influence and large number of students are emphasized by the sources studied,[32] his circle did not form a distinct group. The jurists of Bukhara became a distinct group of Hanafi scholars only two centuries later, and Abū l-Faḍl al-Bukhārī, together with his teacher al-Subadhmūnī and his student Abū ʿAlī al-Nasafī (d. 424/1032),[33] are representatives of this group. Compared with the other groups, however, the Bukhara group was still at an early stage of its formation. The Bukhara group enjoyed its Golden Age in the eleventh century. Almost everyone who determined the mainstream of Hanafi positive law for the next centuries, such as al-Halwānī (d. 448/1050), the al-Bazdawī brothers (d. 482/1089), Khāharzāda (d. 483/1090), al-Sarakhsī (d. 483/1090), al-Ḥasīrī (d. 500/1107), Abū l-Muʿīn al-Nasafī (d. 508/1114), Ṣadr al-Shahīd Ibn Māza (d. 536/1141), ʿAlāʾ al-Dīn al-Samarqandī (d. 538/1144), and their disciples, was affiliated with the Bukhara circle of the eleventh century. As the groups of Iraq and Balkh weakened, Bukhara distinguished itself as the place where the most influential reinterpretation of Hanafi juristic tradition was created; the texts most relied upon in later periods were written by such jurists as al-Halwānī and al-Sarakhsī.

In the tenth century we also encounter two other groups of jurists, viz. the jurists of Samarqand and Nisapur, which seemingly could not develop as distinct entities in the way that the three aforementioned *mashāyikh* groups did. Certainly, the Hanafi legal literature does not regard these jurists congregated in Samarqand and Nisapur as distinct groups in tenth-century Hanafi scholarship.

As commented upon above, it is surprising to find that al-Māturīdī was

not the leader of a prominent group in Transoxania. After all, nearly two centuries after his death a movement of some Samarqand jurist-theologians made his name the eponym of a Sunni theological school, Maturidism. We would therefore expect him to have been a leader of a *mashāyikh* group in the region he lived, especially in Samarqand, where there was indeed formed, as a matter of fact, a partly separate circle.[34] This group worked mainly in theology, however, and did not produce enough legal works and opinions on positive law to be distinguished.[35] The most famous in this group was al-Māturīdī, who is rarely mentioned by later authors of Hanafi law. This group probably began with Abū Bakr al-Juzjānī (d. 285/898),[36] the teacher of Abū Naṣr al-Iyāḍī (d. after 260/874),[37] who was the teacher of al-Māturīdī.

The network in Nisapur during this period centered on the jurists Qāḍī l-Ḥaramayn Abū l-Ḥusayn and Abū Sahl al-Zujājī.[38] Both were educated in Iraq, and the latter actually belonged to the *mashāyikh* of Iraq. Abū l-Ḥusayn was also affiliated with al-Karkhī's circle, but was in all probability not a member of that group. Although these Nisapuris of the tenth century seemed to form a distinct group as a social network, they did not develop an independent *mashāyikh* group in terms of shared legal opinions.

Distinct groups as holders of different legal opinions

It is not surprising that in the huge area from Egypt to China where Hanafi scholarship existed, the Hanafi presence was concentrated in some centers. It is to be expected that some teachers attracted more students than others, and that these circles continued to exist after the death of their masters as their students continued to teach Hanafi law in other parts of the Islamic world. Thus, new centers for Hanafi education appeared in different regions within a few generations. These groups, however, represent not only the concentrated networks of certain popular circles but also different opinions and emphases that were recognized by their contemporaries and later scholars. There are literally thousands of opinions ascribed to each of these groups, and each group was identified as a separate entity based on the different legal opinions and emphases they held.[39]

To return to our original three groups, I am not going to classify the opinions of these groups according to the classical taxonomy of Islamic law, nor to any classification of modern laws, but according to their disagreements with the Hanafi masters and with one another. By doing so, I hope to clarify the core area of the madhhab, the area that provided continuity throughout the history of the madhhab. The differences among

these groups concerning Islamic positive law occurred on various levels of legal thinking; I am going to explore them starting from the most concrete level.

1. Different social settings in the regions where the groups were located led them to produce different opinions from those of the masters and one another. By social surroundings I mean all the given facts characteristic of a region that Islamic law takes into consideration in solving legal problems. It would be convenient to assert that the opinions based on regional factual data can be categorized in two spheres according to whether they represent provisional, impermanent phenomena or more inherent, deep-rooted ones.

The different customs and textures of the societies of the regions comprise the first category. A discussion on unintentional homicide and the indemnity (*diya*) due is a typical example of divergences of that kind of opinions. According to the Hanafi masters, when someone is killed or injured by way of an unintentional act (*khaṭā'*) or by one that is quasi-deliberate (*shibh 'amd*), the members of the offender's extended family (*'āqila*) are required to pay an indemnity. However, the jurists of Balkh claimed that this opinion was based on the social structure of Arab society, which consisted of large families and tribes from which the members receive solidarity and mutual support. In Khurasan the structure of families was quite different. There was no mutual support among the members of extended families or among distant relatives, and therefore the rules concerning the liability of extended family could not apply in Khurasan. According to the jurists of Bukhara, however, there were at least some tribes and large families sharing relevant characteristics of Arab society in Transoxania and Khurasan, and therefore they opined that the rules about the extended families could apply in these two regions.[40]

A number of legal problems on the interpretation of the declaration of intention discussed between the groups seem to be items belonging to this category as well. Each group produced different solutions for them on the ground that the legal expressions signify, more or less, different intentions and meanings in each region. These groups disagreed with their masters and with their contemporaries on many points of positive law, from contracts of marriage to those of sale, from partnerships to rent, by asserting that their current usage of language was different from other regions as well as from the Iraq of Abū Ḥanīfa's time. The classification of divorce formulas are a case in point. Proper statements of divorce (*alfāẓ al-ṭalāq*) are legally effective in Islamic law and end the marriage, and for this reason divorce formulas were examined in detail by Muslim jurists. One of

the classifications concerned the ability to convey intention. While Hanafi masters and the *mashāyikh* of Iraq classified expressions of divorce into explicit (*ṣarīḥ*) and allusive (*kināʾiyy*), and considered them subject to different rules, the *mashāyikh* of Balkh created another section, "allusives annexed to explicit expressions" (*mulḥaq bi-l-ṣarīḥ*). They maintained that certain expressions that are allusive in theory in Iraqi practice transformed into phrases that have explicit and unanimous meanings in their regions;[41] therefore, they must be treated like grammatically explicit expressions.

A second category at this level consists of those issues based on current socio-political and economical contexts of the regions in that era. A discussion on the provisions of testimony can be given as a typical example for this class of opinions. The jurists of Balkh asserted that a judge must not accept the testimony of bureaucrats who worked in departments of government that were responsible for fiscal policy. The ruling government in their region, they thought, was not just (*ʿādil*) towards its subjects in that matter and the bureaucrats shared responsibility for this policy.[42]

Justifying opinions that diverged from those of the masters, the jurists of Balkh used the term *istiḥsān*, juristic preference, or to use a better term, equity law. Abū Ḥanīfa and his disciples used this concept in order to abandon an established analogy or any deduction from the primary sources of the law. The jurists of Balkh gave the term a slightly different but interesting meaning. In this sense, what is abandoned is not the result of analogical or syllogistic reasoning from the primary sources, but the opinions of Abū Ḥanīfa and other Hanafis. For example, according to Abū Ḥanīfa and his disciples, a labor contract under which the employee will produce certain goods and in exchange will acquire a certain proportion of said goods, is not permissible. The jurists of Balkh claimed that there was a customary practice in their region for this type of contract, and they therefore applied the method of *istiḥsān* in order to set aside Abū Ḥanīfa's opinion and declare this contract permissible.[43] Generally speaking, the juristic activities of the Balkh and Bukhara groups often engaged in the elimination of their masters' legal opinions that were based on the factual data of Iraqi society in the late eighth century.[44]

2. Constructing legal phenomena. Islamic law not only expands the positive law, but incorporates other kinds of knowledge concerning the legal world in general as well. A significant share of the literature of Islamic law involves discussions of definitions and descriptions of legal phenomena. "What is the city?" for example, and "Is the city a place where the division of labor is extant or just a place having a bigger population than a typical village?" "What is money?" or "What is value and counter-value?"

are two other examples out of many. By defining and describing these kinds of concepts, Muslim jurists construct a legal world that in large measure falls into the sphere of modern social sciences. An important share of the disagreement among the three Hanafi groups is about the definition and description of legal phenomena. For example, the definition of recitation (*qirāʾa*) was a matter of discussion among these groups. According to the jurists of Balkh, recitation is an utterance that reaches the ear, whereas the jurists of Iraq claim that it is just a pronunciation of the letters. The jurists of Iraq maintain that recitation is by definition an act of the tongue, not of the ear.[45] The deaf person is able to recite; therefore, hearing is not intrinsic in this concept. This disagreement resulted in many school differences about a wide range of issues from prayer to divorce, from oath-taking to witnessing.

Discussions on meaning, especially boundaries, of concepts as "criminal fraud" (*ghabn fāḥish*) and "forged" (*zāʾif*), as in counterfeit money, are examples of this kind of efforts by these groups.[46] In fact, one of the main roles of legal works by jurists affiliated to a madhhab, especially after the formation period, is that of refining and processing concepts of the social world that the eponyms and early generations of the madhhabs employed.

3. The interpretation of the Hanafi juristic tradition. Like other Hanafis in history, these three groups regarded the Hanafi juristic tradition as a legal source and derived legal norms from it. A major share of the disagreements among the groups grew out of their different interpretations of the Hanafi legacy, both in regard to the sources of the tradition and in regard to the legal reasoning behind the interpretation of these sources. A major source for the interpretation of the Hanafi legacy are the opinions of the eponym Abū Ḥanīfa and members of his circle, especially Abū Yūsuf and al-Shaybānī. Texts containing these opinions were classified, according to their authoritativeness, into *ẓāhir al-riwāya* (the prevailing opinion) and *nādir al-riwāya* (the rare opinion). The definitive definition for these terms understands *ẓāhir al-riwāya* to refer to six texts by al-Shaybānī (*al-Aṣl, al-Jāmiʿ al-kabīr, al-Jāmiʿ al-ṣaghīr, al-Siyar al-kabīr, al-Siyar al-ṣaghīr,* and *al-Ziyādāt*) and this classification is considered to cover the most representative works on Abū Ḥanīfa and his disciples. The classification *nādir al-riwāya*, on the other hand, contains opinions that are not included in these six texts. We can safely assume that this classification already existed in the tenth century, although it had not yet been definitively defined. *Ẓāhir al-riwāya* has precedence over other sources in the interpretation of the Hanafi legacy, and this principle seems to have been adoped by jurists of both Balkh and Iraq. Yet there exists disagreement regarding the meaning and

interpretation of the *zāhir al-riwāya* texts. For example, al-Shaybānī does not mention the opinions of Abū Ḥanīfa in many places in his book *al-Jāmiʿ al-kabīr*. The jurists of Iraq claimed that al-Shaybānī's opinions represent the position of Abū Ḥanīfa, whereas the jurists of Balkh asserted that all the references to Abū Yūsuf, who disagrees often with al-Shaybānī, represent Abū Ḥanīfa's position.[47]

The jurists of Balkh relied noticeably more on *nādir al-riwāya* opinions than the Iraqi jurists, using them in their interpretations to produce new rules.[48] In the tenth century, these opinions were only known through a few scattered compilations, some authored texts that were not widely disseminated, and oral transmission. The Iraqis seem to have been reluctant to use them, and this approach is in accordance with their activities in the fields of legal theory and legal maxims, which indicate a search for the principles of the Hanafi legacy and its outlines rather than an attempt to gather subsidiary knowledge about this legacy.

In addition to producing new rules based on *zāhir al-riwāya* and *nādir al-riwāya* texts, the *mashāyikh* selected different opinions from these sources to adopt as the positive law to apply in the courtroom and in the practice of fatwa-giving. For example, the jurists of Iraq chose the opinion of Abū Ḥanīfa on the matter of making over a joint tenancy to a foundation (*waqf ḥiṣṣa al-mushāʿ*) and deemed it not permissible, while the jurists of Balkh, because they applied the opinion of Abū Yūsuf in their region, considered it permissible.[49] The legacy of a madhhab is not confined to opinions of the eponym and his disciples; it extends to the opinions of every affiliated jurist who contributed to Hanafi law throughout history. Like other madhhab-affiliated jurists, the *mashāyikh* groups of the tenth century referred to and discussed opinions of the jurists who lived in the period between the eponym and their time, yet their emphasis tended to be regional. The jurists of Iraq concentrated for the most part on early Iraqi figures, like ʿĪsā b. Abān and al-Thaljī, while the jurists of Balkh mostly discussed those who lived in Khurasan, such as Muḥammad b. Muqātil al-Rāzī and Nuṣayr b. Yaḥyā, whose names are practically non-existent in works by Iraqi jurists.

Divergence in legal reasoning

Positive law was not the only area in which there were divergences among these groups. Some of their differences stemmed from the type of legal reasoning they used to produce legal norms from the Hanafi juristic tradition. Different methods predominated in the works of each group. The jurists of Iraq used analytical deduction to derive new legal norms from

the works of the masters, employing the syllogism by connecting the logical extensions of the legal concepts with each other. For example, according to al-Karkhī, the benefits in leasing contracts should have the same rulings as sales contracts. In a sales contract, the party who owes the capital asset (*ʿayn*) has the right to refrain from his contractual obligations[50] until he obtains payment or liquidation from the party who owes the pecuniary obligation (*dayn*). Therefore, the lessor has the right to refrain from delivering the object of the leasing contract until he obtains the agreed-upon payment from the lessee.[51] Al-Karkhī's conclusion here is a plain deduction from a general rule produced by himself.

Analogy, however, was the more dominant method in the works of the jurists of Balkh. Generally speaking, they made analogies between the problems the masters solved and the problems they faced. Thus, they found different solutions from those of the Iraqis. One example of this is al-Iskāf arguing that if there is a contract between someone and a tailor for the latter's services, and textile has been provided but no fee has been agreed upon, the tailor should receive an adequate payment (*ajr al-mithl*) for his work, to be decided by the court, even if the parties later agree on a higher fee. Al-Iskāf reached this conclusion by drawing an analogy from a case of usurpation (*ghaṣb*) discussed by Abū Yūsuf and al-Shaybānī, according to whom the usurpation of a textile that later becomes useless, obliges the usurper to pay an adequate amount to be decided by the court. Any amount higher than this agreed upon by the two parties through settlement (*sulḥ*) was invalid.[52]

As for the jurists of Bukhara, we may never have sufficient information to reach a conclusion about their type of legal reasoning since we lack original tenth-century sources written by a Transoxanian and recording the argumentation used by jurists from this region. Later Transoxanian sources, although they mention many of their opinions, cannot be verified as to authenticity.

4. Different interpretations of the primary sources of Islamic law

The Quran, the Sunna, and consensus, *ijmāʿ*—and the application of the methods of interpretation of these sources led jurists to diverge from the opinions of the masters and the later Hanafis. For the Hanafi masters, a divorce declaration by an intoxicated man (*sakrān*), for example, is valid, whereas al-Karkhī disagreed. He interpreted the relevant Quranic verse as a specified norm, on the principle that unconscious people, including the mentally incapacitated, are not responsible for their verbal acts. Therefore repudiation by an intoxicated man is legally void. Abū Bakr al-Iskāf's interpretation of the prophetic tradition "Imams are from Quraysh" is another

example. Arguing on the basis of this tradition, the majority of Muslim scholars, including the Hanafi masters, opined that one of the requisite qualifications to be a caliph was to be a member of the Quraysh tribe; al-Iskāf interpreted the tradition to mean, however, that only one of the criteria was stemming from Quraysh: if the Muslim community agreed on a non-Qurashi, this person is qualified to be caliph.[53]

Different activities

That these groups disagreed with each other on the positive law and that they employed different kinds of legal reasoning are, in fact, elements of a larger picture that colors their total scholarly achievement. When the biographies of the members of these groups are examined and their works are classified, it appears that each group can be identified on the basis of its unique involvement with legal theory, theology, and the prophetic tradition. These differences are less black and white than offering different hues.

To begin with legal theory, the jurists of Iraq, especially the main figures such as al-Karkhī, al-Jaṣṣāṣ, and Abū ʿAbd Allāh al-Baṣrī, were heavily involved in discussions that fall into the sphere of *uṣūl al-fiqh*, the discipline that emerged as a separate scholarly enterprise after the death of Abū Ḥanīfa. The earliest extant Hanafi book on this discipline is that of al-Jaṣṣāṣ, the central figure of the Iraqis after al-Karkhī. Both Hanafi and non-Hanafi literature on legal theory include many citations of the opinions of the Iraqi group and quotations from their works.[54] Neither the jurists of Balkh nor those of Bukhara apparently did much work in that discipline.

The Iraqis' work in legal theory parallels their approach of extracting the principles on which the Hanafi juristic tradition is based. Al-Karkhī was one of the first jurists to deduce a list of maxims (*qawā'id al-kulliyya*) such as "certainty is not superseded by doubt." Although such principles were adopted later as the general principles of Islamic law, the motive behind his work was to create general principles of Hanafi law.[55] Even if the works on legal theory and on the principles of Hanafi tradition (which is also called *uṣūl* by al-Karkhī) developed by the Iraqis have different vocabularies, they share a common object in the last analysis: determining what is the basis of the whole Hanafi juristic legacy.

In the spectrum of works about these two spheres of law, the jurists of Iraq and Bukhara are located at opposite ends, while those of Balkh occupy a point between them, though closer to Bukhara. Although the jurists of

Balkh did not generate scholarly texts in these two spheres, some of their works shared the object of the Iraqis, that of reducing the Hanafi legacy into principles. Abū l-Layth's two works, *Ta'sīs al-nazā'ir*[56] and *Khizānat al-fiqh*,[57] for example, are books of positive law, but they convert the Hanafi legacy into formulaic and general rules.

The work in legal theory and in the general principles of Hanafi law in the tenth-century Iraqi circle seems to be in line with their approach to another Islamic discipline, *kalām*. Almost all of the jurists of Iraq were Muʿtazili in terms of their being members of the Muʿtazili theological circle in Baghdad, their studying and teaching Muʿtazili doctrine, and their adoption of some characteristic Muʿtazili opinions of that age.[58] Moreover, some Muʿtazili leaders were members of the circle of the Hanafi jurists of Iraq. For example, Abū ʿAbd Allāh Ḥusayn b. ʿAlī al-Baṣrī (d. 369/979), a student of al-Karkhī and the author of legal works defending the Hanafi juristic tradition, was one of the leaders of Muʿtazilism at that time.[59]

The jurists of Balkh were keen members of another theological doctrine, *irjā'*. In fact, the city of Balkh was labeled Murji'abad, the land of *irjā'* doctrine.[60] In the Hanafi tradition, this doctrine dates to Abū Ḥanīfa himself. The books ascribed to Abū Ḥanīfa are among the earliest texts of the *irjā'* movement, and those who transmitted these texts are mainly the prominent jurists of Balkh.[61] This group also taught and wrote commentaries on these texts and made them components of the Hanafi curriculum in Balkh.[62] The jurists of Iraq, in contrast, neither transmitted nor wrote commentaries on these texts.

The jurists of Bukhara, like the Balkh circle, were also opponents of Muʿtazilism, but they did not generally work in the sphere of theology, even in its *irjā'* version. Neither they nor their successors in the eleventh century included any discussions along these lines in their studies or curriculum. In this they resemble Abū Yūsuf and al-Shaybānī, who accepted Abū Ḥanīfa's theological opinions in general, though they did not follow his work in theology. Compared with Abū Ḥanīfa, both jurists engaged in much more hadith-oriented transmission and, in exchange, they were favored by those who wrote among the *ahl al-ḥadīth*. Likewise, the jurists of Bukhara engaged in hadith studies much more than the other two groups did, showing less interest in theology, and as a result they were given more sympathetic treatment by the biographical writers of the *ahl al-ḥadīth* than were the Iraqi Hanafis. Hadith study was a substantial and in some cases the most important aspect of the legal education in the Bukhara circle. The biographical sources emphasize that hadith transmission was a main item at the very popular circle of Abū Ḥafṣ and al-Subadhmūnī.[63] It was within this group that the prophetic traditions used by Abū Ḥanīfa (*masānid*)

were compiled and the hadith works of al-Ṭaḥāwī became a part of Hanafi education.[64]

What is a madhhab?

Let me recapitulate very briefly the situation in the tenth century. There were three main groups within the Hanafi school and they were distinguished by their different scholarly networks, legal opinions, ways of employing legal reasoning, work in legal theory, approaches to theology, affiliation with theological doctrines, and the importance of hadith study in their works. However, they were all regarded as members of the Hanafi school, both by themselves and by later generations. How should we therefore define the Hanafi madhhab of the tenth century, i.e., the entire gamut of achievements by jurists who were regarded as Hanafi by the historical sources? The Hanafi madhhab of the tenth century is different from that of later centuries, even the twelfth century, when certain legal opinions in positive law, approaches to theology and legal theory, and practices of fatwa-giving and jurisdiction already differed from those held in the tenth century.[65] Moreover, like the other madhhabs, the Hanafi school of law has different extra-legal implications in each age and region where it existed, let alone purely legal differences. For instance, the tenth-century Hanafi madhhab in Nisapur had certain political and ideological positions about the central Seljuq government[66] that the seventeeth-century Hanafis in Istanbul, naturally, did not share.

Theoretically, one could list the opinions that all Hanafis shared, ignoring the historical contexts which gave them additional meanings. As far as we know, for instance, every Hanafi jurist agreed with the opinion of Abū Ḥanīfa on the ratio legis of usury. This opinion is one that distinguished Abū Ḥanīfa and his students from non-Hanafi jurists of their time and that was followed by the great majority of Hanafis through the ages. Other characteristic opinions of Abū Ḥanīfa and his disciples, such as "drinking date-wine (*nabīdh*) is permissible," "one must not raise his hands during *rakʿa* in prayer," and "declaration of divorce by one intoxicated is valid," were at times disputed,[67] yet these jurists who held differing opinions regarded themselves as Hanafi and other jurists did as well.

At this point we should ask whether there is any opinion of the masters that is immune from disagreement by jurists affiliated with those masters' madhhabs? Theoretically speaking, the legal opinions of Abū Ḥanīfa have no additional binding force in that they must be followed by Hanafi jurists. The axis of the concept of madhhab found in every affiliated jurist's work

is not a complement of legal norms, nor is it a group affiliation. It is a certain form of legal reasoning. By this I do not mean the methodology created to interpret the Revelation and discussed in the books of legal theory, but the reasoning applied within a particular juristic legacy. What was changed by the rise of the madhhabs was neither a shift in the function of law nor in its domain, but rather an epistemic turn, a turn that determined that a particular juristic past was a legal source in the broad meaning of the term.

The jurists who affiliated themselves with a madhhab built their juristic activities on that particular past. This past had a starting point: the opinions of the eponym. In order to solve legal problems, the first disciples of the eponym discussed their master's opinions and analyzed his sources and methodology, creating their own opinions by rejecting or accepting those of their master. The next generation did the same thing but worked within the larger legacy of Abū Ḥanīfa and his disciples. This continued down the centuries, with each generation adding its own achievements and, thereby, establishing an increasingly larger juristic legacy. From the beginning of the madhhab's development, this legacy has been a source of reference for the jurists affiliated to the school. From the moment of the madhhab's inception, its jurists produced legal knowledge verifying that their work was based on Quran, Sunna, *and* their school's juristic tradition.

As a source of reference, this legacy was predominant in two main senses. First, by employing certain interpretative tools invented for this purpose, *takhrīj* and *tarjīḥ*, the jurists derived new legal norms from this legacy, especially from the works of the masters. Legal problems were solved through extending the opinions valid in the past.

Secondly, the juristic tradition as a cumulative body of all previous works created a base on which the jurists established their opinions. The opinion of an affiliated jurist developed under the multi-dimensional influence of that tradition. Even if he rejected a concept, a classification, or a norm held by previous generations, including that of the eponym, he discoursed on that tradition, developing his position within the coordinates of the rejected ones. I call this reasoning "intra-madhhabic reasoning"; it is a reasoning that operates in a particular juristic tradition, one that builds on what has been accomplished in a certain juristic past. Intra-madhhabic reasoning is legal thinking about history. There are Hanafis such as al-Karkhī who rejected the typical opinions of Abū Ḥanīfa, or those, such as Abū l-Qāsim al-Ṣaffār of tenth-century Balkh, who disagreed with Abū Ḥanīfa on thousands of issues, but there was not one Hanafi who did not take the Hanafi juristic tradition as a legal source.

This type of reasoning, I believe, is the crucial point, an epistemic turn

that distinguishes classical Islamic law from its earliest age, i.e., the pre-madhhab era, as well as from the modern age. Modern scholarship in Islamic law, even as it utilizes many texts from the classical age, lacks this reasoning to a great extent. It studies the history of Islamic law but it does not build its juristic activities on a certain history. Intra-madhhabic reasoning provided a tool with which an affiliated jurist could create norms while his work remained inside the juristic tradition of a school of law. This reasoning was the axis of both continuity and change in classical Islamic law.

Conclusion

Abū Ṭālib al-Makkī asserted that the rise of madhhabs, the writing of literary works, and the entertaining of individual opinions occurred at the same period of time.[68] These seemingly different facts are indeed connected and comprise only certain aspects of the same greater development, that is, the rise of Islamic disciplines. Although dating back to the Prophet's time, Islamic disciplines, as independent scholarly enterprises, emerged in the second century of Islam. As with any discipline, they emerged by people becoming exclusively involved in the concepts and problems of their separate fields. The concepts and problems of an intellectual field are cumulative and are inherited from the past; what his predecessors did and thought with regard to a field influences a specialist of a discipline in his treatment of the same. The concept of the madhhab, as mentioned above, implies at the same time the emergence of works and discourses on a certain juristic past, that is to say, the emergence of a discipline, fiqh. The boundaries of what would be discussed in the discipline of fiqh were defined by the concept of madhhab. The study of fiqh does not seem possible without the concept of madhhab and its twelve-century-old examples, i.e., the Hanafi, Maliki, Shafiʿi, Hanbali, and other schools of law.

The rise of the madhhab represents a civilizational progress through which Islamic civilization constructed its own disciplines. The civilizational scale of this progress is verified in that the emergence of the madhhabs was synchronic. Interestingly, the decline of intra-madhhabic reasoning, and to a large extent the decline of madhhabs, and the beginning of modernization in the Islamic world, or the dissolution of Islamic civilization, are also synchronic.

Chapter Four

THE INTRODUCTION OF MĀLIK'S TEACHINGS IN AL-ANDALUS

Alfonso Carmona

Introduction

This chapter[1] discusses when, how, and by whom the legal doctrine of Mālik b. Anas (d. 179/795) was introduced into al-Andalus (the Iberian peninsula in Islamic times).[2] I do not intend to explain why the Maliki school of jurisprudence became predominant there and was given the status of official madhhab.[3] Chronologically the chapter ranges from about AH 150, when Ghāzī b. Qays entered al-Andalus with Mālik's *Muwaṭṭaʾ*, to AH 287, when the last Andalusi who had met with Mālik's students died. In this long period I distinguish three stages, or generations. The first is that of the forerunners, contemporaries of Mālik: a few scholars who have left few traces in Andalusi jurisprudence. The second is that of the founders of Andalusi Malikism, most of whom never met with Mālik. I place the end of this second generation in AH 238, the date of ʿAbd al-Malik b. Ḥabīb's death and the begin of the long reign of the amir Muḥammad, in whose time the third generation flourished. The third generation are the scholars who completed the reception of Maliki teachings, fixed the doctrine to be followed (*taqlīd*), and overcame important differences.

A great part of my sources are biographical, and this poses the problem of their credibility, since an excessively critical attitude towards biographical compilations has made that literature suspect. But even if their purpose is not always the transmission of historical facts, these compilations are not entirely devoid of historical truth.[4] Three or sometimes four generations separate Muḥammad b. Ḥārith al-Khushanī (d. 361/971)—the author of one of my principal sources—from the period at hand; and I consider reports with a heading such as "I received from A, who heard B saying that he saw/heard C doing/saying," which we find in that source, as being real witnesses or actual relics of that period.